Supreme Court, U.S.
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No. 99-463

IN THE

# Supreme Court of the United States

RICHARD SULLIVAN,

*Petitioner,*

*v.*

RIVER VALLEY SCHOOL BOARD; RIVER VALLEY EDUCATION ASSOCIATION; CHARLES O. WILLIAMS, Superintendent for River Valley Schools; PHIL BENDER, President of River Valley Education Association; JANE TEMPLE, GARY B. SOMMERS, PAMELA BEHNKE, DENNIS ZEIGER, RICHARD RIETH, VICKIE PAILING, LYNDA VACKAR and WESLEY LIND, jointly and severally in their individual and official capacities,

*Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

## BRIEF IN OPPOSITION FOR RESPONDENTS RIVER VALLEY SCHOOL BOARD, WILLIAMS, TEMPLE, SOMMERS, BEHNKE, ZEIGER, RIETH, PAILING, VACKAR AND LIND

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether this Court should exercise its discretion and grant certiorari even though Petitioner failed to raise an important constitutional issue not previously settled by this Court or identify a conflict between the Michigan and federal courts in applying controlling law.

II. Whether the Michigan appellate courts properly concluded that a private dispute between a public school district and one of its teachers did not implicate the constitutional First Amendment right of freedom of speech.

## LIST OF PARTIES

Petitioner Richard Sullivan, an individual, is a public employee of the River Valley School District.

Respondent River Valley School Board is the Board of Education of the River Valley School District, a Michigan public school district. Respondent Charles O. Williams, an individual, was the Superintendent of the River Valley School District at all times pertinent hereto. Respondents Jane Temple, Gary Sommers, Pamela Behnke, Dennis Zeiger, Richard Rieth, Vickie Pailing, Lynda Vackar, and Wesley Lind, all individuals, were members of the Board of Education of the River Valley School District at all times pertinent hereto.

Respondent River Valley Education Association is a Michigan non-profit corporation which represents a bargaining unit of teachers for the purpose of collectively bargaining with Respondent River Valley School Board. Respondent Phil Bender, an individual, was President of the River Valley Education Association at all times material hereto.[1]

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1. Respondents River Valley Education Association and Phil Bender are represented by separate counsel and will submit a separate Response to the Petition for a Writ of Certiorari.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Counter-Statement of Questions Presented | i |
| List of Parties | ii |
| Table of Contents | iii |
| Table of Cited Authorities | v |
| Opinions Below | 1 |
| Counter-Statement of Basis of Jurisdiction | 3 |
| Constitutional and Statutory Provisions Involved | 4 |
| Counter-Statement of the Case | 5 |
| A. Factual Background | 5 |
| B. Proceedings Below | 7 |
| Summary of the Argument | 8 |
| Reasons for Denying the Writ | 9 |
| I. Petitioner Has Not Identified Any Legitimate Basis For This Court To Exercise Its Discretion To Grant Certiorari. | 9 |
| A. This Case Does Not Involve An Important Or Unresolved Constitutional Issue. | 9 |

*Contents*

*Page*

B. No Conflict Exists Between the Michigan and Federal Courts. ..... 10

II. The Decisions Of The Lower Courts Are Not Erroneous. ..... 11

A. The Michigan Appellate Courts Identified the Correct Legal Standard Controlling Petitioner's Claim. ..... 12

B. The Michigan Courts Properly Applied Controlling Law to Petitioner's Claim. ..... 13

C. The Constitution Should be Interpreted with Common Sense. ..... 21

Conclusion ..... 23

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Bahr v. Jenkins*, 539 F. Supp. 483 (E.D. Ky. 1982) ..... 21

*Barnes v. McDowell*, 848 F.2d 725 (6th Cir. 1988) ..... 17

*Board of Regents v. Roth*, 408 U.S. 564 (1972) ... 4

*Chappel v. Montgomery Co. Fire Protection Dist No. 1*, 131 F.3d 564 (6th Cir. 1997) ..... *passim*

*Cliff v. Board of School Commr's of the City of Indianapolis*, 42 F.3d 403 (7th Cir. 1994) ..... 19

*Connick v. Myers*, 461 U.S. 138, 146 (1983) .... *passim*

*Dambrot v. Central Michigan Univ.*, 55 F.3d 1177 (6th Cir. 1995) ..... 19

*Dodds v. Childers*, 933 F.2d 271 (5th Cir. 1991) .. 19

*Dorsett v. Board of Trustees for State Colleges & Universities*, 940 F.2d 121 (5th Cir. 1991) ..... 19

*Givhan v. Western Line Consol. School*, 439 U.S. 410 (1979) ..... 21

*Cited Authorities*

*Page*

*Hopkins v. City of Midland*, 158 Mich. App. 361, 404 N.W.2d 744 (1987) ..... 15

*Howard v. Board of Educ. of Sycamore Community Unit School Dist. No. 427*, 893 F. Supp. 808 (N.D. Ill. 1995) ..... 19

*Jeffries v. Harleston*, 52 F.3d 9 (2nd Cir. 1995) ... 19

*Khuans v. School Dist. 110*, 123 F.3d 1010 (7th Cir. 1997) ..... 18

*Michigan State AFL-CIO v. Michigan Employment Relations Comm'n*, 212 Mich. App. 472, 383 N.W.2d 433 (1995) ..... 15

*Pickering v Board of Educ.*, 391 U.S. 563 (1968) ..... 12, 14

*Rahn v. Drake Center, Inc.*, 31 F.3d 407 (6th Cir. 1994) ..... 17

*Rakin v. McPherson*, 483 U.S. 378 (1983) ..... 12, 18

*Sanguigni v. Pittsburgh Bd. of Public Educ.*, 968 F.2d 393 (3rd Cir. 1992) ..... 19

*Wales v. Board of Educ of Community Unit School Dist 300*, 120 F.3d 82 (7th Cir. 1997) ..... 18

*Cited Authorities*


*Page*

**Statutes:**

28 U.S.C. § 1257(a) ..... 3

42 U.S.C. § 1983 ..... 2, 4, 12

42 U.S.C. § 1986 ..... 1

**United States Constitution:**

First Amendment ..... *passim*

Fourteenth Amendment ..... 3

**Rule:**

Supreme Court Rule 14(1)(a) ..... 3

Respondents River Valley School Board, Dr. Charles Williams, Ms. Jane Temple, Mr. Gary Sommers, Ms. Pamela Behnke, Mr. Dennis Zeiger, Mr. Richard Rieth, Ms. Vickie Pailing, Ms. Lynda Vackar and Mr. Wesley Lind (collectively "River Valley School District") respectfully request that this Court deny Petitioner Richard Sullivan's Petition for a Writ of Certiorari.

## OPINIONS BELOW

Petitioner filed this lawsuit in the Circuit Court of Berrien County, Michigan, on or about July 2, 1993, alleging a variety of state and federal claims.[2] On February 14, 1994, the Berrien County Circuit Court issued its written opinion dismissing Petitioner's complaint, in its entirety, as to all River Valley School District Respondents. (*See* Petitioner's Appendix, pp. 36a-54a). The formal Order of Dismissal was entered two days later, on February 16, 1994. *Id.*, pp. 33a-35a. Petitioner's claims against the union Respondents were subsequently dismissed by two separate orders, dated March 15 and December 13, 1994.

Petitioner appealed to the Michigan Court of Appeals. In an unpublished decision dated July 11, 1997, the Michigan Court of Appeals unanimously affirmed the Circuit Court's dismissal of Petitioner's Complaint as to all parties. (*See* Petitioner's Appendix, pp. 9a-23a).

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2. Petitioner's First Amended Complaint contained the following five counts: (1) Defamation; (2) Intentional Infliction of Emotional Anguish and Interference with Contract and Business Relationships; (3) Tort of False Light/Invasion of Privacy; (4) Constitutional and Civil Rights; Conspiracy to Deny Civil Rights; (5) Violation of 42 U.S.C. § 1986.

Petitioner then sought leave to appeal to the Michigan Supreme Court. On September 15, 1998, in lieu of granting leave to appeal, the Michigan Supreme Court remanded one issue to the Michigan Court of Appeals and instructed the Michigan Court of Appeals to reconsider Petitioner's claim under 42 U.S.C. § 1983 in light of the Sixth Circuit decision of *Chappel v. Montgomery Co. Fire Protection Dist No. 1*, 131 F.3d 564 (6th Cir. 1997).[3] (*See* Petitioner's Appendix, pp. 6a-7a).

The Michigan Court of Appeals, in a *per curiam* decision dated November 6, 1998, applied the federal standard governing Petitioner's free speech retaliation claim. Again, the Michigan Court of Appeals unanimously held that the Petitioner's First Amendment claim was properly dismissed on summary disposition. (*See* Petitioner's Appendix, pp. 1a-4a).

Petitioner's second application for leave to appeal to the Michigan Supreme Court was denied on June 29, 1999. (*See* Petitioner's Appendix, pp. 55a-56a). Petitioner now seeks a Writ of Certiorari for this Court to address whether the Michigan appellate courts properly interpreted and applied controlling law on the issue of whether Petitioner's speech was of a "private" or "public" nature, for purposes of constitutional protection.

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3. The sole issue in *Chappel* was whether a public employee's speech involved a matter of "public" concern sufficient to trigger constitutional protection. No other issues were remanded, nor did the Court of Appeals, on remand, discuss anything other than *Chappel* and the free speech issue.

## COUNTER-STATEMENT OF BASIS OF JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). Petitioner seeks review of the June 29, 1999 Michigan Supreme Court's decision denying his application for leave to appeal the Michigan Court of Appeals' Opinion and Order entered November 6, 1998. That Michigan Court of Appeals decision affirmed the dismissal of Petitioner's First Amendment free speech claim.

Petitioner argues that he was denied due process by not receiving what he calls a "name clearing hearing." The due process issue, however, is not properly before this Court. Petitioner failed to include it as a question presented in his Petition for a Writ of Certiorari, as required by Supreme Court Rule 14(1)(a). Moreover, the due process issue is not part of the question he did present because *Chappel v. Montgomery Co Fire Protection Dist No. 1*, which served as the basis for the Michigan Court of Appeals' decision, did not substantively involve a due process claim or any due process issues. It only involved a free speech issue.

Additionally, Petitioner's statement of applicable statutory and constitutional provisions only quotes the First Amendment. It does not cite the Fourteenth Amendment or any other due process provisions. These omissions bar consideration of the due process issue at this juncture. Simply stated, this Petition involves nothing more than a First Amendment claim.[4]

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4. Even if Petitioner's Fourteenth Amendment liberty interest due process claims were considered to be properly before this Court, which Respondents expressly deny, this claim is fatally flawed (Cont'd)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*Constitutional Provision:*

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*Statutory Provision*:

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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(Cont'd)
because Petitioner failed to demonstrate that his good name, reputation, honor or integrity were at stake, or that he was *improperly* denied a "name clearing hearing." *See Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

## COUNTER-STATEMENT OF THE CASE

### A. Factual Background

Petitioner is a tenured teacher employed by the River Valley School District, where he has taught since 1977.[5] During the 1990-1991 school year, Petitioner withdrew from the local teachers' union after losing a grievance arbitration over his unsuccessful bid for a coaching position. Since then, Petitioner has been involved in a large number of disputes with the River Valley School Board and the local union, which ultimately precipitated this lawsuit.[6]

Despite resigning his union membership, Petitioner was still required to make nominal annual payments to the union, referred to as "agency shop fees," pursuant to the collective bargaining agreement between the School District and the union. The agency shop fee is that portion of the full union dues allocated to the cost of negotiating and administering the collective bargaining agreement. Because Petitioner received many of the benefits and privileges contained in the collective bargaining agreement, even though he was not a member, he was expected to pay his fair share of the costs

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5. *Subsequent* to this lawsuit, Petitioner's teaching duties were interrupted during the 1996-1997 and 1997-1998 school years when the Michigan Teachers' Tenure Commission ordered that Petitioner serve a two year unpaid suspension as discipline for various acts of misconduct and insubordination. (*See* Union Respondents' Brief Opposing Certiorari, Appendix pp. 48a-95a).

6. To minimize the amount of material this Court must review, Respondents herein incorporate by reference the detailed factual summary and description of misrepresented facts offered by the Union Respondents.

to acquire those benefits. If a teacher failed to pay the agency shop fee, the collective bargaining agreement *required* the school board to commence pre-termination proceedings, upon request of the union.

During the 1991-1992 and 1992-1993 school years, Petitioner refused to pay his agency shop fees in a timely fashion. When he eventually did pay, he wrote personal checks and mailed them to the Michigan Education Association (the parent organization of the local union) and included the words, "under protest." However, Petitioner failed to notify either the local union or the school district that he made the required payments. Due to Petitioner's gamesmanship, neither the school district nor the local union knew that Petitioner had paid his fees. So, in accordance with the collective bargaining agreement, the union asked the District to initiate pre-termination proceedings.

In response to the union's requests during both school years, the school board scheduled the pre-termination hearing contemplated by the collective bargaining agreement. The sole purpose for the hearings was to determine *whether* Petitioner paid his fees. Before any hearings were held, however, Respondents learned that Petitioner had paid the agency shop fees, albeit under protest. Consequently, the hearings were immediately canceled. At no point was Petitioner terminated, suspended, reprimanded, or in any other way disciplined as a result of the fee issue. The collective bargaining agreement does not require, or even provide for, a formal hearing to address the disagreement after the fees are paid.

Out of this course of events, Petitioner began claiming that Respondents were either inept or involved in some manner of conspiracy to deny him his rights. Petitioner alleged that Respondents' misdeeds included secret deals, illegal agreements, disregard of constitutional guidelines, and an intentional failure to truly represent the membership. All of these allegations stemmed from the private spat between Petitioner and Respondents. When the school district refused to schedule what Petitioner calls a "name clearing hearing," he filed his five-count complaint. It is critical to understand that at no point in time between Petitioner's objection to paying the agency shop fees and the circuit court decision was Petitioner disciplined for anything he said or did.

The Statement of Facts in Petitioner's Brief focuses on the *setting* in which many of his complaints were aired, and he mischaracterizes his complaints as "public," rather than the private disputes they really were. He points out that the disagreements were aired publicly and reported in the newspaper. The fact remains, however, that Petitioner's complaints did not address matters of public concern. Everything Petitioner points to as inappropriate concerned private problems he was having with this employer and the local union.

**B. Proceedings Below**

Petitioner's complaint, in addition to various state tort claims, contains a count alleging that Respondents violated his federal constitutional rights. The complaint contends Petitioner's free speech and due process rights were violated. The trial court dismissed these claims, as to the school Respondents, on February 16, 1994. The Michigan Court of Appeals affirmed the dismissal of the constitutional claims on July 11, 1997.

On September 15, 1998, the Michigan Supreme Court remanded only the First Amendment issue to the Michigan Court of Appeals. At that point, the due process issue disappeared from this case entirely. On remand, the Michigan Court of Appeals examined only the free speech issue, as required by the free speech analysis contained in *Chappel v. Montgomery Co Fire Protection Dist No. 1, supra.* Consequently, the only issue preserved for this appeal, should this Court exercise jurisdiction, involves freedom of speech.

## SUMMARY OF THE ARGUMENT

This case does not present an issue worthy of this Court's attention. It does not involve an important or unresolved constitutional issue and does not involve conflicting rulings between the Michigan and federal courts.

Moreover, the lower courts' decisions are not erroneous. The Michigan Court of Appeals identified and applied the correct legal standard to Petitioner's free speech retaliation claim. The Michigan Courts properly refused to elevate this private personnel dispute to a "matter of public concern" deserving constitutional protection. The lower courts used the same legal analysis and common-sense approach articulated by this Court and applied by other federal courts.

## REASONS FOR DENYING THE WRIT

## I.

## PETITIONER HAS NOT IDENTIFIED ANY LEGITIMATE BASIS FOR THIS COURT TO EXERCISE ITS DISCRETION TO GRANT CERTIORARI.

Petitioner fails to satisfy the criteria traditionally applied by this Court to decide whether to grant certiorari. This case does not involve an important or unresolved constitutional issue, and Petitioner has not demonstrated that the legal standard used by the Michigan appellate courts deviated from the controlling standard articulated by this Court. Petitioner has identified no conflict between the decisions of the Michigan and federal courts regarding the standard that applies here, *i.e.*, whether a private personnel matter constitutes an issue of "public concern" deserving constitutional protection.

Also, the facts of this case are sufficiently unique that any possible precedential value is extremely remote. The issue presented by Petitioner concerns only himself and has no significance beyond its impact on the immediate parties.

### A. This Case Does Not Involve An Important Or Unresolved Constitutional Issue.

This case does not involve an unresolved legal principle of major significance. Instead, it involves a rule of constitutional law firmly established by the United States Supreme Court and consistently applied by numerous state and federal courts. Simply stated, the issue is whether a private personnel issue between a public employee and his

employer deserves First Amendment protection, when the dispute did not involve a matter of "public concern." The Michigan courts' decisions in this case neither created a new rule of law nor erroneously applied the rule of law to the facts. The Michigan courts below followed the rule of law which controls the free speech analysis, as articulated in *Connick v. Myers*, 461 U.S. 138, 146 (1983).

**B. No Conflict Exists Between the Michigan and Federal Courts.**

Without citation, most notably in Petitioner's "Question Presented for Review," Petitioner alleges that the state courts of Michigan have adopted, and are following, a rule of interpretation involving free speech claims which conflicts "with current federal court interpretations on the issue of what constitutes a matter of public concern." (*See* Petition for a Writ of Certiorari, at p. *i*). While Petitioner is clearly unhappy with the conclusion the Michigan courts reached under the facts of this case, it is also clear that no true conflict exists between the Michigan and federal courts concerning the *standard* that must be applied.

In fact, the Michigan Supreme Court even remanded Petitioner's free speech retaliation claim to the Michigan Court of Appeals to ensure that the standard the Court of Appeals initially used to affirm the dismissal of the claim was *consistent with federal law*. (*See* Petitioner's Appendix, pp. 6a-7a). The Michigan Supreme Court made certain that the Michigan Court of Appeals applied the controlling legal standard in the same manner the Sixth Circuit Court of Appeals did in *Chappel v. Montgomery Co. Fire Protection Dist No. 1*, *supra*, and *Chappel* itself followed this Court's analysis in *Connick*. The Michigan Supreme Court virtually guaranteed consistent application of controlling law by remanding Petitioner's First Amendment retaliation claim.

On remand, the Michigan Court of Appeals followed the *Chappel* analysis, which embodied the legal standard articulated by this Court in *Connick v Myers*. The Michigan Court of Appeals ultimately held that Petitioner's "speech" did not involve "matters of public concern." In reaching that conclusion, the Michigan Court of Appeals applied the same standard articulated by this Court and did not apply or create a different rule of law. Petitioner has failed to identify a genuine conflict between the Michigan appellate courts and their federal counterparts concerning the application of First Amendment retaliation standards in the public employment context.

## II.

## THE DECISIONS OF THE LOWER COURTS ARE NOT ERRONEOUS.

A writ of certiorari is also unnecessary because the Michigan Court of Appeals' dismissal of Petitioner's complaint was proper. The cases Petitioner cites do not justify a different result. The Michigan courts appropriately rejected Petitioner's free speech retaliation claim after recognizing that Petitioner's speech involved private matters, not matters of public concern. The courts applied a common sense interpretation of the United States Constitution and recognized that not all disputes between public employers and employees necessarily implicate the First Amendment.

**A. The Michigan Appellate Courts Identified the Correct Legal Standard Controlling Petitioner's Claim.**

Petitioner's first appeal to the Michigan Supreme Court challenged the dismissal of his entire case. Rather than grant leave to appeal, that court remanded a single issue to the Michigan Court of Appeals for reconsideration in light of the Sixth Circuit's decision of *Chappel v. Montgomery Co. Fire Protection Dist No. 1*, *supra*. Remand was limited to whether dismissal of Petitioner's free speech claim (brought under 42 U.S.C. § 1983) could be sustained under the *Chappel* reasoning. The issue was limited to whether Petitioner's comments to the Board of Education, the media, and others constituted speech on a public issue, which *might* enjoy constitutional protection.

Not all speech enjoys constitutional protection. This Court has firmly established that for speech to be cloaked with constitutional safeguards, a Plaintiff must, as a matter of law, demonstrate that the speech at issue involved a matter of public concern. *See Pickering v Board of Educ.*, 391 U.S. 563, 568 (1968); and *Connick v Myers*, *supra*. The question of whether particular speech is protected by the First Amendment is a *matter of law* to be determined by the Court. *See Rakin v. McPherson*, 483 U.S. 378, 386 n.9 (1983). Clearly, the Michigan courts identified the correct standard before concluding that Petitioner failed to meet his burden. Therefore, Petitioner's assertion that the wrong standard was used by the courts does not justify certiorari.

**B. The Michigan Courts Properly Applied Controlling Law to Petitioner's Claim.**

After identifying the correct legal standard controlling Petitioner's First Amendment claim, the lower courts properly applied it to the facts of this case. The Michigan Court of Appeals, the first time it reviewed this case, identified *Connick v. Myers* as controlling authority. On remand, it again recognized *Connick* as the seminal decision in this area of law, and then applied the principle espoused therein to the facts of this case, in the manner articulated in *Chappel v. Montgomery*. In other words, there is absolutely no doubt that the Michigan courts identified and properly applied the correct, controlling legal standard to Petitioner's free speech retaliation claim. As more fully explained below, attention by this Court is, therefore, unnecessary.

In *Connick v Myers*, *supra*, this Court was asked to decide whether the "speech" of Assistant District Attorney Sheila Myers, who opposed her transfer to a different section of the criminal court, deserved constitutional protection. Myers distributed a questionnaire to other Assistant District Attorneys soliciting their comments on office transfer policy, office morale, the need for a grievance committee, the level of supervisory competency, and whether employees felt pressured to work on political campaigns. Myers was eventually terminated for refusing to accept the transfer and was told that her distribution of the questionnaire was an act of insubordination. She filed suit contending she was wrongfully terminated for exercising her constitutionally protected right of free speech.

The *Connick* Court began by reaffirming the principle that "a State cannot condition public employment on a basis

that infringes the employee's constitutionally protected interest in freedom of expression." *Connick*, 461 U.S. at 142 (citations omitted). The Court explained that "[t]he First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . speech concerning public affairs is more than self-expression; it is the essence of self-government.' " *Id.* at 145 (citations omitted). This Court's goal when examining any free speech claim brought by a public employee is "to seek a 'balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of public services it performs through its employees.' " *Id.* at 142; *quoting Pickering*, 391 U.S. at 568. *Connick* clearly explains that there must remain a "common sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick, supra*, at 143.

However, whether an employee's speech addressees a matter of public concern must be determined by examining "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. The content, form and context of Myers' speech revealed that Myers' questions about the competency of and trust in co-workers, the abilities of supervisors, office morale, and the need for a grievance committee were mere extensions of her dispute over her transfer to another section of the criminal court. The questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is concerned with the status quo. Even though discipline and morale may be related to the efficient performance of a public office, the focus of Myers' questions was not to evaluate the performance of the office "but rather to gather ammunition

for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause cèlèbre." *Id.* at 148.

The *Connick* Court refused to presume that every remark or criticism necessarily rises to a constitutional level. "[T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149. Because Myers' complaints involved primarily matters of private concern, notwithstanding her efforts to characterize them as something more, the Court emphatically refused to afford those comments constitutional protection. Accordingly, the Court held that Myers' First Amendment free speech claim failed as a matter of law.

Well-established though the *Connick* analysis is, this issue seems to arise more frequently than one might expect. The result, however, is always the same. Office disagreements, no matter how righteously voiced or publicly aired, are purely private matters and not of "public concern" deserving constitutional protection. Not only did the Michigan appellate courts in *this case* recognize that *Connick* was the controlling standard, other Michigan appellate courts have reached the same conclusion. For example, in *Hopkins v. City of Midland*, 158 Mich. App. 361, 404 N.W.2d 744 (1987), the Michigan Court of Appeals cited *Connick* and understood that matters of private concern do not deserve constitutional protection. *Id.* at 385. In *Michigan State AFL-CIO v. Michigan Employment Relations Comm'n*, 212 Mich. App. 472, 383 N.W.2d 433 (1995), it was again recognized that only matters of public concern enjoy First Amendment protection. The Michigan Supreme Court also cited and relied on *Connick v. Myers* in addressing this issue. *Id.* at 495.

Clearly, the Michigan courts have long understood the *Connick* principle and have consistently applied it to issues of public employee speech. As demonstrated above, the Michigan courts properly applied the only rule of law which matters, that set forth by this very Court in *Connick v. Myers*.

Petitioner's question presented is, arguably, broader. He contends the Michigan courts failed to utilize the standard in the same fashion as do the federal courts, generally. The following discussion clearly shows that not only did the Michigan appellate courts follow this Court's clearly espoused rule of law, the Michigan courts' rulings were consistent with those of other federal courts addressing the same subject.

One of the more recent cases on this issue is *Chappel v Montgomery Co. Fire Protection Dist No. 1, supra*. Chappel sued the fire district alleging that he was demoted and given an unfavorable assignment because he spoke out about a number of problems he saw in the fire department. He believed that: the fire district needed a paramedic program; the fire district was being financially mismanaged; there was gross misappropriation of funds and unearned payments to the fire chief's family members; there was nepotism; there was a conflict of interest by the fire chief and that the need for standard operating procedures was not being met. Chappel raised these concerns with members of the fire district board, a state auditor, and a Montgomery County Judge-Executive. These concerns were aired in open meetings and reported by at least two newspapers.

The focus in *Chappel* was that the legal inquiry must be into what the speaker *intends* to communicate rather than into *why* the speaker intends that communication. *Chappel*,

*supra*, at 575. After laboriously setting forth the facts of the case, the court concluded that, Chappel's motives aside, the context of his speech touched on matters of public concern. Because his comments fairly related to matters of political, social, or other concern to the community, they were public matters deserving constitutional protection. *Chappel, supra*, at 574; *quoting Rahn v. Drake Center, Inc.*, 31 F.3d 407, 412 (6th Cir. 1994). However, the *Chappel* court went on to caution that "[t]he mere fact that public monies and government efficiency are related to the subject of a public employee's speech do[es] not, by [itself], qualify that speech as being addressed to a matter of public concern." *Chappel, supra*, at 576; *citing Barnes v. McDowell*, 848 F.2d 725, 734 (6th Cir. 1988).

The courts below quite astutely recognize that while Chappel's speech involved matters of broad social and community implication, Petitioner's did not. Petitioner failed to make any statements expressing points of view on matters of political, social or other concern to the community. He did not raise issues of financial misconduct, did not contend there was a misappropriation of funds, did not allege the existence of nepotism or a conflict of interest, and did not address other general societal issues. Instead, he claimed the Respondents were acting together to harm *him*, disrupt *his* life and otherwise enter into agreements which hindered *his* ability to get his way. The Michigan appellate courts did not focus on Petitioner's motivation for saying what he did. Rather, they recognized that his speech did not involve societal issues, but only addressed his work conditions. This is virtually identical to the speech found unprotected in *Connick v. Myers*. The "content, form and context of a given statement, as revealed by the whole record," fail to support Petitioner's claim. *Connick, supra*, at 147-48.

In fact, Appellant is doing exactly what the *Chappel* court said could not be done. He is attempting to rely on his *motivation* for making the comments he did. Throughout the Petition, Petitioner attempts to bolster his position by contending that his motivations and intentions were pure and for the greater good. Just as Respondents cannot rely on motivation, Petitioner cannot so characterize his speech to obtain constitutional protection.

As stated above, whether one's speech is protected by the First Amendment is *a matter of law* to be determined by the court. *See, e.g., Rakin v. McPherson, supra. Chappel* did not change that standard. It is still a court's obligation to determine, as a matter of law, whether the speech enjoys constitutional protection. *Chappel* involved a particular set of facts which were much different than those established here on the whole record. Under *Chappel*, Petitioner's claims do not touch on public concerns, no matter how publicly he presented them. As private concerns, Petitioner's claim that his free speech right was violated necessarily fails.

Following the principles of *Connick v. Myers*, numerous other federal courts have ruled that a public employee's speech must truly touch on matters of public concern, rather than the employee's personal employment issues, to be constitutionally protected. *See, e.g., Khuans v. School Dist. 110*, 123 F.3d 1010 (7th Cir. 1997) (special education teacher who repeatedly complained about her supervisor, stated only a private complaint and by pleading too much, pled herself out of court); *Wales v. Board of Educ of Community Unit School Dist 300*, 120 F.3d 82 (7th Cir. 1997) (teacher's repeated complaints about administrators' abilities and objections to the way her services were being utilized were

not protected speech. Even if it was of public importance, the claim still failed because it addressed only the personal impact of those issues); *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1185-88 (6th Cir. 1995) (coach's use of racial slur failed to impart socially or politically relevant message); *Jeffries v. Harleston*, 52 F.3d 9, 10-11 (2nd Cir. 1995) (the potential disruption from a professor's use of religious slurs outweighed the value, if any, of the speech); *Howard v. Board of Educ. of Sycamore Community Unit School Dist. No. 427*, 893 F. Supp. 808, 817 (N.D. Ill. 1995) (the public concern element is lacking, as matter of law, if the speech concerns a subject of public interest but is expressed in a way that addresses only the personal impact); *Cliff v. Board of School Commr's of the City of Indianapolis*, 42 F.3d 403, 409-11 (7th Cir. 1994) (complaints about school operations, while being of interest to the public, do not deserve constitutional protection when the expression addresses only the personal implications); *Sanguigni v. Pittsburgh Bd. of Public Educ.*, 968 F.2d 393 (3rd Cir. 1992) (teacher challenged the loss of her coaching position as a retaliation for statements in the faculty newsletter complaining about pattern of harassment, oppression and retaliation in the schools. Such expression was not part of political, social or other community concerns and did not enjoy First Amendment protection); *Dorsett v. Board of Trustees for State Colleges & Universities*, 940 F.2d 121, 124 (5th Cir. 1991) (tenured mathematics professor's challenge to departmental decisions concerning teaching assignments, pay increases, administrative matters and proper procedures were personal in nature); *Dodds v. Childers*, 933 F.2d 271 (5th Cir. 1991) (instructor's complaints regarding employment status by trustee's daughter-in-law constituted a personal grievance rather than issue a public concern). The standards applied by the federal courts in the decisions cited above are identical to those applied by the Michigan Courts.

In this case, there is absolutely no doubt that Petitioner's campaign of disharmony began when he was denied a coaching position in 1990. From that point forward, he voiced his displeasure with the district's administrators and the decisions of the Board of Education. Petitioner's disagreements with the school district and union concerned *his* job, *his* obligation to pay agency shop fees, *his* emotional well-being, and *his* relationship with *his* employer. He also challenged the requirement that he pay agency shop fees. Again, that dispute focused on *his* obligation to pay and was not part of any broad public concern. It is clear that Petitioner did not become a champion of a public point of view; rather, he challenged each and every decision of the Board of Education out of personal animus. His objective was to be as obstinate and difficult as possible, and in that he succeeded. Nowhere in Petitioner's complaint does it appear that his speech was on a matter of truly public concern and his speech did not rise to a level of public concern simply by voicing his displeasure with his employer at public board meetings. The full form, content and context of his speech makes it clear that his sole objective was to redress individual issues. The simple existence of a point which might be of interest to a member of the public does not create a "public" concern for purposes of free speech protection.

Even if some of Petitioner's speech was a matter of concern, that alone *does not* mean that the Michigan courts erred in dismissing his complaint or denying leave to appeal. The *Connick* Court explained that the speech in question must be examined in light of its full form, content and context. Here, that context reflects personal issues only. Moreover, none of the cases discussed above stand for the proposition that speech is *always* beyond regulation by an employer. "When a government employee personally confronts his

immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time and place in which it is delivered." *Givhan v. Western Line Consol. School,* 439 U.S. 410, 415 n.4 (1979). In such instances, discipline is permitted. Simply commenting on a topic of public concern does not divest the government of its right to "the effective and efficient fulfillment of its responsibilities to the public." *Connick, supra*, at 150. The totality of the circumstances here reveal that Respondents did nothing more than fulfill their responsibilities by scheduling the pre-termination hearings of which Petitioner objects.

The Michigan courts clearly understood and properly applied controlling law in concluding that Petitioner's "private" speech did not deserve constitutional protection. The Michigan courts properly applied this Court's standards, as recognized and followed by other Michigan and federal courts. Accordingly, Respondents request that the Petition for a Writ of Certiorari be denied.

### C. The Constitution Should be Interpreted with Common Sense.

Common sense also dictates that this Court deny certiorari. After all, "[c]ommon sense requires that the Constitution must be interpreted in the light of certain facts, which are inherent in the human condition." *Bahr v. Jenkins*, 539 F. Supp. 483, 487 (E.D. Ky. 1982). Here, the Michigan Courts interpreted a teacher's free speech claim in light of "common sense" considerations which are intrinsic to the operation of public school districts.

The Michigan courts identified at least three common sense reasons for not imbuing Petitioner's speech with First Amendment safeguards. First, Petitioner's speech was a mere

extension of his personal dispute over his unsuccessful bid for his coaching position, withdrawal from the union, and dislike of having to pay agency shop fees. Second, the speech at issue reflected nothing more than Petitioner's attempt to turn an essentially private employment dispute into a cause cèlèbre. Third, Petitioner's self-serving motives, while not necessarily dispositive, were relevant in classifying the type of speech.

After all, government officials must be given "wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick, supra*, at 146. Elevating personnel disputes to a point where they deserve First Amendment protection would give public employees an impenetrable shield, making it extremely difficult, if not impossible, for public employers to discipline poorly performing employees. Petitioner asks this Court to establish a standard that would turn private personnel disputes into protected speech; the direct antithesis of what this Court already determined to be appropriate in *Connick, supra*. This case epitomizes the classic reasoning of this Court with respect to the distinction between purely private speech, which is not constitutionally protected, and public speech which is protected. Here, Petitioner's speech is only a private issue.

## CONCLUSION

Because this case fails to present an issue worthy of this Court's review and because the Michigan courts' holdings were correct Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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